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FEB 29 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-817

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LOUIE L. WAINWRIGHT,
Secretary,
Florida Department of Corrections, et al.

vs.

HOWARD VIRGIL LEE DOUGLAS,
Respondent/Cross-Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether this Court should review a decision of the Eleventh Circuit Court of Appeals holding that the Respondent was denied the effective assistance of counsel when the appellate court found that counsel's ineffectiveness prejudiced the Respondent given any of the conflicting legal standards used to assess prejudice when an ineffective assistance of counsel claim is raised.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	i
PRELIMINARY MATTERS REQUIRED BY RULE 34, RULES OF THE SUPREME COURT OF THE UNITED STATES.....	1
STATEMENT OF THE CASE.....	1
REASONS FOR NOT GRANTING THE WRIT THIS CASE DOES NOT INVOLVE A TRUE CONFLICT BETWEEN A DECISION OF A FEDERAL COURT OF APPEALS AND THE HIGHEST COURT OF A STATE.....	14
THE DECISION BELOW WAS CLEARLY CORRECT.....	20
CONCLUSION.....	25

TABLE OF AUTHORITIES

	PAGE
Douglas v. State, 373 So.2d 895 (Fla. 1979).....	11
Douglas v. Wainwright, 521 F.Supp 790 (M.D., Fla. 1981).....	11
Douglas v. Wainwright, 714 F.2d 1532, 1535, 1557, 1558, (11th Cir. 1983)...	11,16,22, 24,25
Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982) Cert. Denied ___U.S.___, 103 S.Ct. 1798 76 L.Ed.2d 364 (Fla. 1983).....	22;23
King v. Strickland, 714 F.2d 1481 (11th Cir. 1983).....	23
Knight v. State, 394 So.2d. 997 (Fla. 1981).....	15
Magnum Co. v. Coty, 262 U.S. 159 at 163 (1923).....	18
Rummell v. Estelle, 590 F.2d 103 (5th Cir. 1979).....	23

TABLE OF AUTHORITIES
CONTINUED

Tedder v. State,
322 So.2d 928
(Fla. 1975)..... 24

U.S. v. DeCoster,
624 F.2d 196
(D.C. Cir. 1979) (en banc) 13

Washington v. Strickland,
693 F.2d 1243
(5th Cir. Unit B, 1982)
(en banc)
Cert. Granted
___U.S.___103, S.Ct. 2451
77 L.Ed.2d 1332
(1983)..... 12,13,14,
15,16,18,
20,22,23

Weidner v. Wainwright,
708 F.2d 614
(11th Cir. 1983)..... 23

OTHER AUTHORITIES:

Rules of the Supreme Court
Rule 17 1(a)..... 16,20

PRELIMINARY MATTERS REQUIRED BY RULE 34, RULES OF THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 34.2, Rules of the Supreme Court of the United States, the preliminary matters required by Rule 34.1(b), (d), (e) and (f) of the Supreme Court Rules have been omitted since they have been accurately set forth in the petition and cross-petition for certiorari.

STATEMENT OF THE CASE

The facts material to resolution of the question presented for review which have not been fully set out previously in either Petitioner's or cross-petitioner's statement of the case are set out below.

Howard Virgil Douglas was convicted of murder in the first degree by a Florida state court. After the jury returned its verdict, the court told the jury that there would be a sentencing phase in which the jury would sit in an advisory capacity (Petitioner's Appendix, p. 126). The court then excused the jury for lunch. After the jury's exit, the court asked counsel to be ready to proceed with the sentencing/penalty phase of the capital proceeding at 1:30 PM (Pet. App., p. 129). When the jury returned after lunch, the court briefly explained how the sentencing phase operated (Pet. App., pp. 130-31). The prosecution then chose not to introduce any new evidence in the sentencing phase but rather to rely on the evidence during the guilt phase of the trial (Pet. App., pp. 132-33).

Counsel for the defendant began his presentation at the penalty phase by stating:

> "Ladies and gentlemen of the jury, I don't need to tell you about the shift and I cannot argue the fact... (Pet. App., p. 133)."

This statement prompted an immediate objection from the prosecution "that this is not the appropriate time for argument" (Pet. App., p. 133). The court then admonished counsel for the defendant to proceed with evidence and to defer argument (Pet. App., p. 134). In response to the court's admonition, counsel for the defendant stated:

> "I have no evidence to submit to the Court at this time," (Pet. App., p. 134).

The court then asked to see counsel at the bench and then retired with counsel to its conference room.

In the conference room, outside the presence of the jury, the court attempted to explain to counsel for the defendant how the penalty phase in a capital proceeding worked (Pet. App., p. 134). The court specifically noted that, "as the court read the statute," almost anything could be offered in mitigation (Pet. App., p. 134). In response to the court's concern about evidence being introduced, counsel for the defendant stated:

> "Well, let the record show from the hour of 12:30 to 1:30 or 2:00 that the defendant has been unable to obtain any evidence and objects to proceeding at this time with the shortness of notice" (Pet. App., p. 135).

The court then inquired of counsel as to what evidence he wanted to obtain (Pet. App., pp. 135-36). Counsel replied that he didn't know what he could obtain

or might obtain (Pet. App., p. 136). The court then stated that the defendant's family was present implying that counsel asked whether the defendant's mother could testify that he didn't want her boy to go to the electric chair (Pet. App., pp. 136-37). When the court answered that she could testify that he's been a good boy, counsel responded to the court by stating:

> "But he hasn't been a good boy" (Pet. App., p. 137).

The court, while counsel for the parties were still in its conference room, next asked counsel for the defendant if he had discussed with his client taking the stand (Pet. App., p. 137). Counsel responded that he has not (Pet. App., p. 137). After stating to counsel that he thought he should, the court asked that the defendant, Douglas,

be brought to the conference room. After Douglas was brought in, the court said to the defendant that he wanted to make sure he had every opportunity to present any evidence in mitigation and asked whether he wanted his family members brought in (Pet. App., pp. 139-40). Counsel for Douglas then stated that the defendant did not want his family brought in (Pet. App., pp. 140-41). The defendant also said at this time that he did not wish to testify (Pet. App., p. 141). At this point, counsel asked that his client, Douglas be "taken out" and that he wanted a further conference with the court and the prosecutor (Pet. App., p. 141).

After Douglas had left, counsel for the defendant sought guidance from the court as to what was the procedure to be followed during the penalty phase (Pet. App., p. 141). In the course of this

discussion, counsel for Douglas made the following comments:

> "I mean, I don't want to get in an argument with the Court and I don't understand the statute, Judge and I don't.... (Pet. App., p. 142).
>
> "I have none" (no evidence to introduce in mitigation) (Pet. App., p. 145).
>
> "That the attorney for the defendant objects to the entry of the proceedings supposed ...commenced at 2:00 o'clock, after a verdict rendered at 12:30 on the grounds that he did not have ample time to either investigate or prepare for any such argument, evidence, or otherwise, as might be presented in behalf of the defendant for mitigation" (Pet. App., p. 145).

After this latter comment, the court again asked counsel whether he had any witnesses he wanted called. The court further emphasized that the penalty phase was something counsel should have contemplated given the nature of the charge and that if he had any evidence to

introduce he would entertain a motion for a continuance (Pet. App., p. 146). Counsel responded that because of "the shortness of notice" he was not "aware of any witnesses he might call or evidence he might present" (Pet. App., p. 146).

The court then asked whether he had discussed this (the penalty phase) with his client (Pet. App., p. 147). Counsel replied "briefly" but that "due to the shortness of time" neither he nor his client was prepared to offer anyone (Pet. App., p. 147). The court then instructed counsel to "get with" his client to see if he knew of any potential witnesses, and if he did, the court would grant a reasonable continuance (Pet. App., p. 147). Although counsel said he would, before doing so, he stated to the court that he knew of no witnesses and his client could tell him of no witnesses

(Pet. App., p. 148). He never then talked with his client at this point.

In response, the court then stated that it had no recourse except to proceed (Pet. App., p. 148), and asked counsel how long he wanted for argument. Counsel answered:

> "Judge, I'm at a loss. I really don't know what to do in this type of proceeding. If I'd been through one, I would, but I've never handled one except this time" (Pet. App., p. 149).

To this comment, the court responded:

> "I think you've got the right to get up there and talk this is a human life" (Pet. App., p. 149).

Counsel then answered:

> "Well, that's the only thing I can say" (Pet. App., p. 149).

The court and counsel then returned to the courtroom. Counsel for the defendant was next asked in the presence

of the jury if he wished to present any witnesses. He stated:

> "I have none" (Pet. App., p. 150).

The prosecutor and counsel for the defendant then made final arguments to the advisory jury (transcript of trial testimony, Volume IV, pp. 621-25). In this argument, counsel for the defendant emphasized that Douglas would not be eligible for parole until he was approximately 62 or 63 years old and that he would be locked up like an animal (TR., pp. 623-24). His closing argument and hence his entire presentation in mitigation took up approximately 1 1/2 pages of the record (TR., pp. 623-25).

The jury recommended life imprisonment, rejecting imposition of the death penalty (Pet. App., pp. 150-51). At a post-trial proceeding, four months

after the guilt and penalty phase, the court chose not to follow the jury recommendation and sentenced the defendant to death.

In post-conviction collateral proceedings a state trial court, the Florida Supreme Court, see Douglas v. State, 373 So.2d. 895 (Fla. 1979), and a federal district court, see Douglas v. Wainwright, 521 F. Supp. 790 (M.D., Fla. 1981), rejected Douglas' claim that he was denied the effective assistance of counsel incident to the penalty phase of his capital trial. No evidentiary hearing was conducted by any of these courts with regard to this claim. The Eleventh Circuit Court of Appeals, however, see Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), set aside the sentence of death, finding that Douglas was denied the effective assistance of

counsel at the penalty phase because of his counsel's failure to investigate any mitigating evidence, his failure to consult with Douglas about the penalty phase prior to same, and because of counsel's repeated emphasis to the trial court, the sentencer, outside the presence of the jury, that no mitigating evidence existed. In concluding that these failures warranted the setting aside of Douglas' death sentence, the Eleventh Circuit held that counsel's ineffectiveness not only created an "actual and substantial disadvantage" to Douglas' defense, see Washington v. Strickland, 693 F.2d 1243 (5th Cir. Unit B, 1982) (en banc), cert. granted, ____U.S.____, 103 S. Ct. 2451, 77 L.Ed.2d 1332 (1983), but also created a great likelihood that counsel's inadequacy affected the outcome of the trial," see

U.S. v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979) (en banc). By reaching this dual conclusion, the Eleventh Circuit obviated the need to address the question presently pending before this Court in Washington v. Strickland, Case No. 82-1554, of what standard is to be used in determining whether a defendant has been prejudiced by ineffectiveness of his counsel, thus entitling him to relief. In this context, despite the fact that Washington v. Strickland was and is pending in this Court, a petition for rehearing and rehearing en banc in this case was denied by the Eleventh Circuit Court of Appeals.

REASONS FOR NOT GRANTING THE WRIT

THIS CASE DOES NOT INVOLVE A TRUE CONFLICT BETWEEN A DECISION OF A FEDERAL COURT OF APPEALS AND THE HIGHEST COURT OF A STATE

Petitioner's argument that this Court should grant certiorari in the instant matter is premised on this Court's action in granting certiorari in Washington v. Strickland, supra. Petitioner asserts that the question presented for review herein is essentially the same question presented in Washington v. Strickland. Petitioner has phrased that question in terms of a conflict between the Eleventh Circuit Court of Appeals and the Florida Supreme Court with regard to the standard to be used in assessing the validity of

ineffective assistance of counsel claims. The Respondent has no quarrel with Petitioner's assertion that the Eleventh Circuit Court of Appeals and the Florida Supreme Court currently do use different standards in this context, at least with regard to the degree of prejudice that must be established to warrant relief, assuming counsel's representation was ineffective, compare Washington v. Strickland, supra, and Knight v. State, 394 So.2d 997 (Fla. 1981). Where the Respondent differs with Petitioner, however, is with regard to whether the instant case unlike Washington, supra, presents this conflict. It is respondent's belief that it does not. It does not, because in the instant matter, the Eleventh Circuit specifically held that the Respondent was entitled to relief irrespective of what standard was

used to determine whether the Respondent was prejudiced by his counsel's ineffectiveness, Douglas v. Wainwright, 714 F.2d 1532, at 1558 (11th Cir. 1983). Hence, the instant case, unlike Washington, supra, does not involve a true conflict between a federal circuit court of appeals and the highest court of the state of Florida. It is not a case then which falls within the parameters of Rule 17 1(a), Rules of the Supreme Court of the United States, which rule suggests that this Court will grant certiorari "when a federal court of appeals ... has decided a federal question in a way in conflict with a state court of last resort." Rather, it is a case in which the state of Florida is simply asking this Court to reverse a decision of the Eleventh Circuit with which it does not agree. In this context, as has been said

on numerous occasions by members of this Court, the Supreme Court is not primarily concerned with the correction of errors in lower court decisions.[1] As former chief Justice Taft put it,

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[1]Stern and Gressman, Supreme Court Practice, 5th Ed. 1978, pp. 297-98. See, for example, the comments of former Chief Judge Vinson reprinted in Stern and Gressman, supra, at pp. 258-59:

> "During the past term of Court, only about 15% of the petitions for certiorari were granted, and this figure itself is considerably higher than the average in recent years. While a great many of the 85% that were denied were far from frivolous, far too many reveal a serious misconception on the part of counsel concerning the role of the Supreme Court in our federal system. I should like, therefore, to turn to that subject very briefly.
>
> "The Supreme Court is not, and never has been primarily concerned with the correction of errors in

> The jurisdiction [of the Supreme Court to review cases by way of certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that 80% of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ.

Magnum Co. v. Coty, 262 U.S. 159, at 163 (1923).

Unlike Washington v. Strickland, supra, then, this case does

> lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the natural rights & uniformity of Judgments.' The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and

not present a true conflict between a decision of the Eleventh Circuit Court of Appeals and the highest court of the state of Florida. Contrary to the assertions of the state, this Court should not grant certiorari in the

(Footnote 1 Cont'd)

> treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. Those of you whose petitions for certiorari are granted by the Supreme Court will know, therefore, that you are, in a sense, prosecuting or defending class actions; that you represent not only your clients, but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country."

instant case because it has done so in Washington, supra.

THE DECISION BELOW IS CLEARLY CORRECT

Rule 17 1(a), Rules of the Supreme Court of the United States, suggests that this Court will grant certiorari, absent a conflict, "when a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of [the] court's power of supervision." Not only does the decision of the Eleventh Circuit in the instant case not fall within this language, but its ruling on Respondent's ineffective

assistance of counsel claim is clearly correct.

Petitioner's quarrel with the holding of the Eleventh Circuit with regard to the merits of Respondent's ineffective assistance of counsel claim seems to lie with the Court's conclusion as to whether the Respondent was prejudiced because of counsel's failings. In this context, given the record of the penalty phase, there can be little doubt that Respondent's counsel failed to render effective assistance during that phase of the trial.[2] Not only does the

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[2]The fact that Respondent's counsel failed to render reasonably effective assistance was so clear to the Eleventh Circuit from the record that it felt it could make such a finding even in the absence of an evidentiary hearing on this issue, Douglas, supra at 1554. No evidentiary hearing with regard to this issue was ever held by the state trial court or federal district court.

record vividly illustrate that counsel did not understand how the penalty phase operated, but it also makes clear that counsel did not investigate or pursue any potential defenses, nor did he consult with his client prior to the penalty phase. Finally, as the Eleventh Circuit emphasized, counsel's failings were exacerbated by his repeated emphasis to the Court, the ultimate sentencer, that there existed no mitigating evidence, Douglas, supra at 1557. By any standard then, Douglas' counsel failed to render reasonably effective assistance, given the totality of circumstances including the fact that Respondent's life was at stake. Clearly, a condition precedent to any effective representation is that counsel independently investigate and prepare, see Washington v. Strickland, supra; Goodwin v. Balkcom, 684 F.2d 794

(11th Cir. 1982), cert den., ____U.S.____, 103 S. Ct. 1798, 767 L.Ed.2d 364 (1983); Weidner v. Wainwright, 708 F.2d 614 (11th Cir. 1983); King v. Strickland, 714 F.2d 1481 (11th Cir. 1983); Rummell v. Estelle, 590 F.2d 103 (5th Cir. 1979). Respondent's counsel simply did not do so. Equally important to effective representation is that counsel not prejudice his client through his own comments, see King v. Strickland, supra. Here, as the Eleventh Circuit emphasized, counsel did so during the penalty phase.

Petitioner's quarrel then with the Eleventh Circuit decision is with its findings as to prejudice. In this context, it must be emphasized that the jury unanimously recommended life imprisonment, Douglas, supra, at 1535. As such, given Florida law, see

Tedder v. State, 322 So.2d 928 (Fla. 1975), in order to override the jury recommendation, the trial court would have to find that "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ," Tedder, supra at 910. Given this standard, it was imminently reasonable for the Eleventh Circuit to conclude that respondent's counsel's failings as set out previously not only "created an actual and substantial disadvantage to the course of ['Douglas''] defense" but also "a great likelihood that counsel's inadequacy affected the outcome of the trial," Douglas, supra at 1558. Any other conclusion would render meaningless the constitutional guarantee to the effective assistance of counsel.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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